

# Congress of the United States

Washington, DC 20515

October 15, 2007

## Support the Free Flow of Information Act of 2007

*"Our liberty cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it." -Thomas Jefferson, 1786.*

Dear Republican Colleague:

We write to ask for your support for H.R. 2102, the **Free Flow of Information Act of 2007**. This bill will be considered on the House floor this week. It currently has seventy-one bipartisan cosponsors, and it was reported out of the Judiciary Committee by voice vote on August 1, 2007.

As Republicans who believe in limited government, we know that the only check on government power in real time is a free and independent press. The Free Flow of Information Act ensures that journalists possess the ability, except in certain situations, to keep the identity of sources confidential and report appropriate information to the American public without fear of intimidation or imprisonment. Without such protection of sources, many whistleblowers will refuse to step forward, and journalists will be disinclined to provide our constituents with information that is important for them to know.

At its heart, however, the Free Flow of Information Act is not about protecting reporters; it is about protecting the public's right to know. The bill sets criteria that must be met to compel the disclosure of sources and information from journalists in a federal criminal or civil matter. Our standards carefully balance the public's interest in the free flow of information and the fair administration of justice. The bill provides exceptions to allow for compelled disclosure of sources in cases where terrorism, national security, bodily harm or death, trade secrets, and personal medical or financial information are at issue.

The bill has been endorsed by numerous commentators, newspaper editorial boards, and other organizations. Last week, former Solicitor General of the United States, Theodore Olson, editorialized about the bill's companion legislation in the Senate in the Washington Post. A copy of his op/ed is attached for your review.

Passage of the Free Flow of Information Act is vital to maintaining a free and independent press in the United States. We encourage you to support this bill when it is considered by the House this week. If you should require any additional information, please contact Josh Pitcock ([josh.pitcock@mail.house.gov](mailto:josh.pitcock@mail.house.gov), x53021) with Rep. Pence.

Sincerely,



Mike Pence  
Member of Congress



Howard Coble  
Member of Congress



Greg Walden  
Member of Congress

*Theodore B. Olson*

## ... Or Safeguards?

### *Limited Protections Are Vital to a Free Press*

The Senate Judiciary Committee will consider the Free Flow of Information Act today. This bill aims to establish standards under which federal courts can balance the public's interest in keeping journalists' sources confidential against its interest in requiring disclosure of those sources in the pursuit of justice.

As I wrote on this page last year, journalists reporting on high-profile controversies cannot function effectively without offering some measure of confidentiality to their sources. Their ability to do so yields substantial benefits to the public in the form of stories that might otherwise never be written about corruption and abuse of power. A person with information about wrongdoing is often vulnerable to retaliation if exposed as an informant.

Yet it has become almost routine for journalists to be slapped with federal subpoenas seeking the identity of their sources. From the Valerie Plame imbroglio to the Wen Ho Lee case, it is now *de rigueur* to round up reporters, haul them before a court and threaten them with fines and jail sentences unless they reveal their sources.

While 49 states and the District of Columbia have laws protecting the confidentiality of reporters' sources, recent federal court decisions have refused to recognize such protections. Thus, reporters may be protected if they are subpoenaed in state court but not protected at all if a federal court issues the same subpoena.

This makes no sense. Reporters do not expect to be above the law. But they should receive some protection so they can perform their public service in ensuring the free flow of information and exposing improper conduct without risking jail sentences. A free society depends on access to information and on a free and robust press willing to dig out the truth. This requires some ability to deal from time to time with sources who require the capacity to speak freely but anonymously.

The lack of federal protection makes for an especially strange state of affairs because the Justice Department has had internal standards providing protection to journalists and their sources for 35 years, and Special Counsel Patrick J. Fitzgerald claimed to be adhering to those standards when he subpoenaed reporters in the Plame affair. Thus, as Judge Robert Sack of the U.S. Court of Appeals for the 2nd Circuit has noted, the only real question is whether federal courts should be given some supervisory authority to ensure that prosecutors have, in fact, met governing standards before forcing reporters to testify. The answer seems obvious: yes.

Congress has worked to create a federal standard governing reporters, their sources, publishers, broadcasters and judges.

The House Judiciary Committee passed its Free Flow of Information Act this summer with a bipartisan majority including conservatives, liberals and moderates.

The version before the Senate Judiciary Committee is also sponsored by a bipartisan group of legislators and is modeled largely on Justice Department guidelines. It would not provide an absolute privilege for confidential sources but would require, among other things, that a party seeking information from a journalist be able to demonstrate a real need for that information and that it is not available from other sources.

Matters involving classified information and national security are treated differently. Information that would assist in preventing an act of terrorism must be disclosed — without any application of a public-interest balancing test. Critics contend that the bill still imposes an excessive burden on the government. In cases implicating national security, however, the government is given great leeway where the potential harm is "significant and articulable." This is not an inappropriate obstacle to investigations but a reasonable check on the government.

Another criticism is that the legislation would allow criminals to seek protection as "covered persons" subject to the law's protections. But the bill denies the coverage of a reporters' privilege to groups the State Department lists as terrorist organizations and others to whom this shield of confidentiality should clearly not be conferred. In any event, courts are well equipped to make determinations about whether someone has been "engaging in journalism," as the law would require. Indeed, courts are charged with making such determinations regarding the scope and application of laws all the time.

The District and the 49 states with shield laws have experienced no diminution of law enforcement efforts as a result of those laws. The legislation would not give reporters special license beyond the type of common-sense protection we already accord to communications between lawyers and clients, between spouses and in other contexts where we believe some degree of confidentiality furthers societal goals.

This legislation is well balanced and long overdue, and it should be enacted.

*The writer, a former solicitor general of the United States, has defended reporters and news organizations from subpoenas seeking to force the disclosure of confidential sources, including Time Inc. in the Plame investigation, and has also represented The Post.*